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RATNERPRESTIA			CASTELLANO, STEPHEN J	
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WILMINGTON, DE 19899			PAPER NUMBER	
			3727	

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/611,765
Filing Date: July 01, 2003
Appellant(s): SOKOLA, LEONARD R.

MAILED
JUL 26 2005
Group 3700

Mr. Frank P. Tice
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 9, 2005.

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A preliminary matter pertaining to the absence of sections (9) evidence appendix and (10) related proceedings appendix exists. It is assumed that appellant doesn't rely on evidence in arguing this appeal and that no related proceedings have transpired.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

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The appellant's statement of the grounds of rejection is substantially correct. The changes are as follows:

Appellant's brief presents arguments relating to an amendment containing new matter filed May 24, 2004, the drawing objection and the claim objection. These issues relate to petitionable subject matter under 37 CFR 1.181 and not to appealable subject matter. See MPEP § 1002 and § 1201.

The appellant's statements pertaining to the other grounds of rejection are correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

Patents:

D400,403	Brownell	11-1998
D370,154	Gruneisen, III	05-1996
4,863,033	Buj	09-1989

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The grounds of rejection presented below are exactly as stated in the final Office action mailed December 8, 2004.

Claims 1-5, 7 and 10-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Buj.

Buj discloses a dinnerware article (plate and eating utensils) adapted to receive food, comprising: a shallow container (plate or dish), a raised likeness of a creature (statuette of dolphin 2) affixed to the upper surface and a graphical diet reminder on the upper surface (spoon 3 and fork 6).

Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Buj.

Buj discloses the invention except for the resemblance of a pig. It would have been obvious to modify the type of creature resembled (such as a pig) as a matter of design choice and as a matter of little criticality since the application teaches a wide variety of different animals.

Claims 17 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buj in view of Gruneisen, III (Gruneisen).

Buj discloses the invention except for the likeness being hollow. Gruneisen teaches a container that resembles a basketball that is hollow and has a bottom and a removable top. It would have been obvious to modify the likeness of the dolphin to be hollow and have a bottom and a removable top as motivated by the reduced weight and access to a separate compartment that can provide storage adjacent to the shallow container.

Claims 13, 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buj in view of Brownell.

Buj discloses the invention except for graphical diet reminder on the central section and the graphical diet reminder indicating a breakdown of diet according to food categories,

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comprising an image of a food pyramid, comprising a motivational message and comprising numerical nutritional information. Brownell teaches a food pyramid shaped plate. It would have been obvious to shape the plate of Buj to be triangular and to include compartments corresponding to sizes of food groups in order to remind the consumer of proper nutritional eating habits.

Claims 1, 10, 13, 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brownell in view of Buj and Gruneisen.

Brownell discloses a dinnerware article adapted to receive food, comprising: a plate having an upper surface with a center or center section and a border section adjacent and surrounding the center section, the border section extending to the edge, an image of a food pyramid on the central section as the compartments form a pyramid shape. Insofar as the so called pyramid of the present invention is triangular in shape, the triangular shape of the central section defines the pyramid. Brownell discloses the invention except for the removably affixed hollow statuette of a pig and removable top of the statuette. Buj teaches an animal statuette and Gruneisen teaches a hollow removable statuette with a removable top. It would have been obvious to add a removable hollow statuette to provide another compartment of aesthetically pleasing appearance to provide an added area for storage that has ready access through a removable top. It would have been obvious to make the statuette resemble a pig or any other animal as motivated by design choice and personal preference as no criticality has been associated with the pig.

(10) Response to Argument

The definition of the terms in the claims are given their plain and ordinary dictionary meaning as appellant has not supplied or disclosed any other meaning.

102 Rejection

Appellant argues that an actual spoon and fork can't be a pictorial representation of a spoon and fork, respectively. Appellant's argument is inadequate and is not based on reason. Appellant reaches a conclusion without proper reasoning. Therefore, the spoon and fork pictorially represent a spoon and fork and are graphical diet reminders on the upper surface since the spoon and fork are placed on the upper surface.

Appellant's criteria for proving that an element is a graphical element would prove that the spoon and fork are graphical. Appellant's criteria is that only if an element depicts something that it is not actually real, then it is graphical. The spoon and fork both depict dolphins. The dolphins are not real. Therefore, the spoon and fork are graphical. The dolphins are graphical diet reminders that eating (dieting) are fun, that eating seafood is delicious and that eating too much can make a person as big as a dolphin.

Appellant's statement made on page 12, lines 8 and 9 of the brief proves that the spoon and fork are diet reminders. Appellant has admitted that the spoon and fork encourage eating. Appellant incorrectly has assumed that diet involves only the reduction of eating. Dieting is what a person eats as well as how much a person eats. Dieting involves increasing food, water and liquid quantity as well as reducing food and liquid quantity. Therefore, a dolphin simulation on the spoon and fork stimulates the child's playful nature and encourages the child to eat more and reminds the child that eating (dieting) is fun as opposed to torture.

103 Rejection: Buj

Appellant states that this combination is not properly motivated because replacing a dolphin with a pig would need some connotation of obesity within Buj. Claim 16 doesn't state an obesity limitation, a thin, frail, starving pig may be used. Appellant states that a walrus, hippo, whale and an imaginary creature may be used. Therefore, there is no criticality to the creature.

103 Rejection: Buj in view of Gruneisen

Appellant directs attention to the fact that the simulated ball of Gruneisen is not a raised likeness of a creature. This much is true. Gruneisen's ball is hollow. Gruneisen states that the top and bottom of the ball are removable as the removed or detached orientations are shown. Buj already teaches the likeness of a creature. Gruneisen teaches a raised likeness of an object (ball) that is hollow. The hollow teaching and the removable top teaching of a raised likeness (ball) is being added to the dolphin raised likeness of a creature of the primary reference of Buj.

103 Rejection: Buj in view of Brownell and Brownell in view of Buj and Gruneisen

Appellant states that Brownell's plate is not a pictorial representation. Brownell shows a pictorial representation of a food pyramid (see "OTHER PUBLICATIONS" section of patent cover). The examiner or the inventor of the Brownell patent cited a food pyramid reference providing a connection between the triangular shape of the plate and the triangular shape of representations of the food pyramid. Therefore, since Brownell is a pictorial representation of a

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food pyramid, it is a graphical diet reminder, it is on the central section. The food pyramid (triangular shaped) plate is a diagram indicating a breakdown of diet according to food categories and is an image of a food pyramid.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Stephen Castellano



Conferees:

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